

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

WET SOUNDS, INC. §  
Plaintiff, §  
§  
v. § CIVIL ACTION NO. 1:17-CV-00141-LY  
§  
AUDIO FORMZ, LLC §  
Defendant. §  
§

**FIRST AMENDED COMPLAINT**

Wet Sounds, Inc. (“Wet Sounds” or “Plaintiff”) files its First Amended Complaint complaining of Audio Formz, LLC (“Audio Formz” or “Defendant”) and would respectfully show the following:

**PARTIES, JURISDICTION AND VENUE**

2. Plaintiff is a Texas Corporation with its principal place of business in Harris County, Texas.

3. Audio Formz is a Texas limited liability company with its principal office in Van Zandt County, Texas. Audio Formz has appeared in this action for all purposes and may be sued through its attorney of record.

4. Venue is proper in this district under 28 U.S.C. 1391(b).

**FACTUAL BACKGROUND**

5. Wet Sounds manufactures and distributes high-end audio speakers used in the marine and off-road-vehicle industries. Its products are distributed in commerce in Texas and throughout the United States. Plaintiff was one of the first companies to directly target marine audio and is generally recognized as the leader in marine audio speakers. Its products are also

used extensively in all-terrain and utility vehicles. Wet Sounds built its reputation and its market-leading position by consistently producing high-quality, innovative products.

6. Wet Sounds makes a number of speakers suitable for different installations. The speakers primarily at issue here are the XS and SW lines of marine speakers, and the REV and ICON lines of tower speakers (i.e. speakers that are attached by specially fabricated clamps to a ski-boat tower or vehicle roll bar). All of the speakers that are the subject of the case at this time are round and appear identical except for the diameter which ranges from 6 to 11 inches. The tower speakers share the same appearance from the front but have a distinctive cone / torpedo shape. A popular add-on option is a ring of LED lighting around the speaker. All have a signature, inherently distinctive design featuring an iron cross faceplate. The combination of features makes the Wet Sounds speakers immediately recognizable for anyone with knowledge of the products available in the industry. The elements of the trade dress, and particularly the iron cross faceplate, do not affect the sound produced by the speakers and are not functional elements of the product but rather distinctive elements of design that identify the Wet Sounds brand.

7. Audio Formz is a competitor in the marine and off-road audio industry. According to its website, Audio Formz designs and manufactures its products in Texas. Audio Formz began using and continues to produce and market a line of speakers clearly intended to look just like the Wet Sounds' speakers. In particular, Audio Formz's EVO and EVOPRO speakers (including tower speakers) are the same size and shape as the Wet Sounds XS and SW line of marine speakers and the REV and IVO tower speakers, including the distinctive iron cross faceplate. There is no reason to use the same distinctive faceplate other than to trade off Wet Sounds' reputation. Everything having to do with the appearance of the Audio Formz products

is strikingly similar to the Wet Sounds products, down to the placement of the optional LED lighting. Without looking at the actual logo imprint on the product it is very difficult to tell the products apart.

8. Defendant did not limit its infringement to the product itself. Wet Sounds has always displayed its product in a number of distinctive ways. This advertising and promotion is done on the Wet Sounds website, in print and at trade shows. Audio Formz has portrayed its product in a virtually identical manner as Wet Sounds including on its website and in print.

#### **CAUSES OF ACTION**

#### **Trade Dress Infringement**

9. Wet Sounds incorporates the preceding paragraphs. Audio Formz' commercial use of trade dress that is virtually identical to the trade dress previously adopted by Wet Sounds causes or is likely to cause customer confusion and to dilute the distinctive quality of Plaintiff's trade dress. The trade dress used by the Defendant constitutes false and misleading descriptions of fact, or false or misleading representations of fact, which are likely to cause confusion or to cause mistake or to deceive as to the affiliation, connection, or association of the Defendant with the Plaintiff, or as to the origin, sponsorship, or approval or the Defendant's goods by the Plaintiff. Defendant's use of the similar trade dress is likely to deceive or cause confusion or mistake as to source or origin of the Plaintiff's goods or services. The Defendant's actions as set forth above constitute a violation of Section 43(a)(1)(A) of the Lanham Act (*15 U.S.C. 1125(a)*).

#### **Dilution**

10. Wet Sounds incorporates the preceding paragraphs. Wet Sounds' trade dress is inherently distinctive and/or has become distinctive of its goods and services and has become a famous mark by virtue of longstanding use, extensive advertising and publicity, and widespread

recognition by consumers and those within the trade, and has been exclusively used in connection with the above-described goods. Audio Formz is commercially using a trade dress that is likely to cause dilution of the quality of Wet Sounds' distinctive mark. Accordingly, Defendant's conduct constitutes dilution in violation of section 43(c) of the Lanham Act (15 U.S.C. 1125(c)) and TEX. BUS. & COM. CODE §16.103. The Defendant's conduct was carried out with knowledge of the existence of the Plaintiff's famous trade dress. The Defendant's actions as described above were willful and deliberate, were committed in bad faith, and were committed for the purpose of trading on Plaintiff's reputation and causing dilution of Plaintiff's famous trade dress.

**Unjust Enrichment of Defendant**

11. As a result of the conduct of the Defendant's wrongful infringement and dilution of the Plaintiff's trade dress and other wrongful acts described above, the Defendant has been unjustly enriched, and the Plaintiff is entitled to recover all profits derived by the Defendant as a result of its wrongful conduct.

**Injunctive Relief**

12. Plaintiff seeks a permanent injunction prohibiting Defendant from continuing the wrongful conduct described herein and preventing Defendant from further distributing in commerce any infringing product.

**Plaintiff's Damages**

13. Wet Sounds seeks damages including but not limited to (i) lost sales revenue and profits; (ii) damage to goodwill; and (iii) lost royalties. Plaintiff has additionally incurred expenses in counteracting the effect of the defendant's unlawful use of the confusingly similar trade dress. Plaintiff further seeks exemplary damages and an award of its reasonable and

necessary attorneys' fees under the Lanham Act claims and under the common law of the State of Texas.

WHEREFORE, premises considered, Wet Sounds requests that upon final trial the court render judgment as follows:

- (i) A permanent injunction in favor of the Plaintiff, enjoining the Defendant from selling, offering for sale or otherwise distributing in to the stream of commerce any products infringing on Plaintiff's protected trade dress;
- (ii) Awarding Wet Sounds its damages for the harm suffered in an amount within the jurisdictional limits of the court, including exemplary damages, plus pre-judgment and post-judgment interest at the maximum legal rate;
- (iii) Order the Defendant to disgorge and pay to the Plaintiff all profits that the Defendant has unjustly earned as a result of its infringement of Plaintiff's registered mark and other wrongful conduct described above;
- (iv) Award Plaintiff its costs, plus reasonable attorney's fees, and for such other and further relief to which plaintiff may be justly entitled.

Respectfully submitted,

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By: /s/ Brian O'Toole /s/  
Brian O'Toole  
State Bar No. 15340510

**ATTORNEY FOR WET SOUNDS, INC.**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served on the following counsel of record via email and regular first class mail on September 22, 2017:

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/s/ Brian O'Toole /s/  
Brian O'Toole